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VALIDITY OF CONTRACT BETWEEN TWO PARTIES RESTRICTING THE RIGHT OF ONE OF THEM TO SETTLE A CONTROVERSY WITH A THIRD PERSON.

It has been objected in a number of cases that an attorney's lien statute, providing that, if an action is brought, or a claim is held for collection, by an attorney, he may notify the adversary party, that he claims a certain portion of the proceeds paid in settlement for his fee, which claim must be taken into account by such party, is unconstitutional. The Supreme Court of Illinois has lately sustained the constitutionality of such a statute in Standidge v. Chicago Rys. Co., 98 N. E. 963.

This court refers to decision by Missouri Supreme Court and by New York Court of Appeals, in support of its ruling, citing O'Connor v. St. Louis Transit Co., 198 Mo. 641, 97 S. W. 150, 115 Am. St. Rep. 495 and Fischer Hansen v. Brooklyn Heights Railroad Co., 173 N. Y. 492, 66 N. E. 95.

The Missouri court does not devote a great deal of consideration to the point, but contents itself with saying that the act did not restrict or destroy any right of the defendant to contract. It simply created a lien upon the cause of action in favor of the attorney at law which the defendant in dealing with the attorney's client was bound to respect. The court seems to consider only the adversary's position in the direct, and not the incidental, effect thereon arising out of the client's giving such a lien. The Illinois case treats the matter from the same standpoint, saying it does not deprive defendants of the right to buy their peace by making contracts of settlement.

But may it be said, that this right is not very materially interfered with, in that defendant by reason of a contract, which does not amount to the transfer of property—a chose in action—and notice thereof, yet cannot complete a setlement with his debtor without subjecting himself to a penalty in behalf of another?

The New York case goes into this matter very much more at length, viewing the situation of the attorney's client, where a statute created "a lien in favor of the attorney on his client's cause, in whatever form it may assume in the course of the litigation, and enables him to follow the proceeds into the hands of third parties without regard to any settlement before or after judgment," as was said in a prior New York decision.

That decision also said: "It is urged by the defendant's counsel that this construction of the section was against public policy, as the law favors settlements." It was said: "This criticism overlooks the fact that the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement. The *client* is still competent to decide whether he will continue the litigation or agree with his adversary."

The New York court, in the Fischer-Hansen case, *supra*, said such a statute was remedial and to be construed liberally, and the court declares that the legislature did not intend to sacrifice the client by preventing him from making an honest settlement of his own cause of action, nor to overturn the ancient and honored rule of law that settlements are to be encouraged, by giving an attorney power to insist that the litigation should continue until he consents that it should stop.

It is thus seen, by every fair inference, that a statute could not create validity for any contract, whereby one may bargain away his right to settle a claim which belongs to him and we perceive that the New York court allowed the objection to be made by the adversary and not by the client. It thereby admitted that, were the contract between the client and the attorney opposed to public policy, the latter could claim no advantage thereunder against his client's adversary. *Ex turpi causa, non oritur actio.*

How, then, may it be claimed that such contracts as are made by employers and

others with indemnity companies, whereby a debtor is forbidden to buy his peace, are valid? The company cannot absolve the employer from any obligation he is under, but it does prevent all settlements not made by its consent. If it is against an ancient and honored rule of law that settlements are to be encouraged, it is a contract against public policy.

The New York court thought, that an attorney having the power to prevent a client from settling his own case without his consent, was opposed to this rule. Is an agreement by one that his hands shall be tied by another than his attorney any the less opposed to this rule?

Take, for example, a claim arising out of contract. There is something in the way of *delectus personarum* when two persons contract. A may not be willing to trade with B on as favorable terms as he would with C. And after C has become indebted to him in the course of contract, he might not be willing that B should be substituted in C's place in negotiations for the settlement of his claim against C, especially if B agrees with C to be substituted as the debtor. Could C impose B on A, when B merely would be looking after his own interests? It would seem clear he could not.

Is there any difference between liability on contract and in tort? And is the right of one against whom there is a claim to buy his peace, more sacred than that of a claimant to effect an honest settlement? Is not one position the necessary corollary of the other? No one may read the cases we have cited without concluding that the hands neither of the claimant nor his adversary must be tied. Indeed, how may any settlement be reached between any two parties, if by contract either has lost his capacity further to contract?

There seems another reason arising out of the statute of frauds for invalidating contracts of the kind we have been discussing. Such an one as the indemnity company cannot in an oral way enter responsibly into negotiations for a settlement or agree with a claimant upon a binding oral compromise, whether part payment he made or not. But its tentative efforts easily may become a source of embarrassment and prejudice to that claimant.

Lastly it is to be said that public policy by statutory rule declares the conditions of contractual incapacity and, presumptively, no individual or individuals in agreement are allowed to invade what is legislative domain.

NOTES OF IMPORTANT DECISIONS.

INTOXICATING LIQUORS — RECOVERY FOR LIQUOR SHIPPED TO CONSIGNEE WITHOUT ITS BEING PREVIOUSLY ORDERED.—The facts in the case of Small Grain Distilling Co. v. Davis, 74 S. E. 897, decided by Georgia Court of Appeals, show that a dealer shipped, of his own motion and without previous order therefor, whisky to defendant living in Georgia. The latter supposing the liquor was a gift took it from the express office. He later received a letter from the dealer proposing to sell the liquor. Defendant refused to buy or pay for the whisky. He wrote saying he had used part of the shipment in making presents to his friends and asked them to advise disposition of what remained. The dealer asked a return of the goods at his expense which he declined to do. The dealer sued and the action was defended on the ground that there was an unlawful sale in Georgia.

Plaintiff insisted that the shipment was protected by the interstate commerce clause and the court distinguished Rose v. State, 133 Ga. 353, 65 S. E. 770, relied on, where orders were solicited by circular. It was said that no order having been given in this case, no implied assumpsit to pay arose out of defendant's keeping and refusing to pay for the whisky.

The opinion said: "The whole conduct of the Distilling Company clearly shows not a contract of sale, but a mere offer to sell which was never accepted by Davis. The title to the whisky never got out of the Distilling Company. In fact no sale was consummated. If Davis had paid for the whisky it would have been consummated. * * * Plaintiff can recover only on the theory that the sale was made to Davis. * * * If keeping the whisky and using it, after having been notified that it was not a gift, but was intended as a sale, raised an implied assumpsit on the part of Davis to pay for the whisky, the contract was completed in

Georgia. * * * The Distilling Company knew that it was a violation of law to sell whisky in the state of Georgia, and, in thus endeavoring to evade the law of this state, the loss of both the whisky and the value thereof was only what it justly deserved."

All of this may be true, but upon what principle may a court declare a forfeiture for an unsuccessful attempt to violate a law? It says no sale was consummated—no title passed and yet that the consumption or use of an owner's property by another raises no duty to account for its value. Was not the attempt to sell merely a collateral matter—merely evidence to show how defendant came into possession of another's property, innocently, at first, supposing he had title thereto?

The insistence by plaintiff's counsel, that this was an interstate transaction was rightly untenable, so far as the question of sale was concerned. Beyond that it had no relevancy, as if there was no sale and no title passed, plaintiff ought to have been allowed to recover for the property's destruction or passing beyond defendant's control, except as this may have been brought about by plaintiff's fault.

It seems to us the Georgia court is rather legislating in this case than deciding a question of law.

MONOPOLIES — STATE LEGISLATION FORBIDDING SALES FOR THE PURPOSE OF DESTROYING COMPETITION.—The Justices of the Supreme Judicial Court of Massachusetts, at the request of the governor of the state, gave their opinion of the constitutionality of a proposed statute "to prohibit discrimination in the sale of commodities." In re Opinion of the Justices, 99 N. E. 294.

The act aimed at three things, one to prohibit any person engaged in general business in the commonwealth from maliciously discriminating in prices of commodities sold in different parts of the commonwealth or to different purchasers; another prohibiting discrimination in prices for the purpose of destroying the business of a competitor and of creating a monopoly, and another to prohibit combinations for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly.

The constitutionality of the proposed law is sustained as to the first two purposes on the theory that: "There is no constitutional objection to a statute which prohibits an act done for the express purpose of annoying or injuring another and with actual malevolence, although the same act done with an innocent intent is lawful."

This cuts into the general principle that where an act lawfully may be done the intent with which it is done cannot be inquired into and asserts that the principle is within statutory control, under, no doubt, the police power.

The third purpose rests on the power of the legislature to prohibit contracts which are designed and have a tendency to create a monopoly. The justices say: "Although the statute is in some respects a limitation upon freedom of contract, yet we are of opinion that it does not go beyond the police power of the legislature," and reference, of course, is made to U. S. Supreme Court decision, though that might not be controlling, except as regards the Federal constitution.

Interstate commerce is said to be only incidentally affected by the statute and police power, therefore, is not forbidden its scope.

While such a statute may be constitutional, proof to show its violation often may be difficult to obtain, as, to show unlawful intent in the doing of an act otherwise lawful makes the doctrine of reasonable doubt a very formidable obstacle to conviction.

WAIVER OF BREACH OF CONDITIONS IN INSURANCE POLICY BY DEMANDING PROOFS AND ADJUSTING LOSS.

I. *Introductory: Scope of Article.*—Whether because of the fact that our courts are amenable to the universal sympathy for the under-dog, or because of the law's confessed aversion to forfeitures, certain it is that they have built up a theory of waiver and estoppel in the law of insurance, such that if the balm were put up in bottles and offered to that class of our population known as "the insured," even *Collier's* could not deny that a label bearing the statement "Guaranteed to cure all ills" were allowable. Of the exigencies, various and sundry, which call for its application, we are here concerned with but one: where, after a loss has occurred, and before settlement thereof, the company or its adjuster learns of the breach of some condition which would avoid the policy, but proceeds, notwithstanding to investigate and adjust the loss.

II. *History and Statement of Rule.*—In 1874, in what appears to be the first case in which exactly this state of facts was presented, the Supreme Court of Wisconsin[1] held that by demanding and causing the insured to produce, at considerable trouble to himself, proofs of loss, after it had learned that the policy was voidable because of a breach of the clause against additional insurance, the company waived such forfeiture and was estopped from relying upon it as a defense to a suit on the policy. In the opinion of the court, Lyon, J., said: "The defendant had an election between two courses of action, each entirely inconsistent with the other. It could have declared the policy void because of the additional insurance effected without its consent, or it could treat the policy as valid, and pursuant to stipulations therein, could require the plaintiff to furnish * * * plans and specifications of the building destroyed. With full knowledge of all the facts, it chose the latter course; and the plaintiff, at great expense to herself, complied with the requirement. This was a most decisive act on the part of the defendant—an act utterly inconsistent with an election to consider the policy void for a breach of any of the conditions thereof; and it seems very clear to us that the defendant is thereby estopped from insisting on a forfeiture of the policy."

Upon the authority of this case, and several others more or less analogous, the New York Court of Appeals[2] formulated this rule: "It may be stated broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, the company recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some expense, the forfeiture as a matter of law is waived, * * * and such a waiver need not be based upon any new agreement or on an estoppel." This rule, stated somewhat more accurately by the Supreme Court of North Carolina,[3] as follows: "If, after a breach of the conditions of a policy, the insurers, with a knowledge of the facts constituting it, by their conduct lead the insured to believe that they will still recognize the validity of the policy, and induce him under such impression to incur expense and trouble, they will be deemed to have waived the forfeiture, and will be estopped from setting it up as a defense," is now well established.[4]

III. *Rationale of the Rule.*—There has been considerable discussion as to whether the rule is founded upon waiver or upon estoppel, but it appears that, in fact, the doctrine is anomalous, being neither strictly waiver nor estoppel, but, rather, a sort

(1) Webster v. Phoenix Ins. Co., 36 Wis. 67, 17 Am. Rep. 479.

(2) Titus v. Glens Falls Ins. Co., 81 N. Y. 410.

(3) Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

(4) German Ins. Co. v. Gibson, 53 Ark. 494, 14 S. W. 672; Hartford Fire Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393; Silverberg v. Phoenix Ins. Co., 67 Cal. 36, 7 Pac. 38; Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89; Scottish, etc., Ins. v. Colvar, 135 Ga. 188, 68 S. E. 1097; Farmers, etc., Ins. Co. v. Chestnutt, 50 Ill. 111, 99 Am. Dec. 492; Replogle v. American Ins. Co., 132 Ind. 360, 31 N. E. 947; Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774; Brown v. State Ins. Co., 74 Iowa, 428, 38 N. W. 135, 7 Am. St. Rep. 495; Corson v. Anchor Mut. Fire Ins. Co., 113 Iowa 641, 85 N. W. 806; Henderson v. Standard F. Ins. Co., 143 Iowa 572, 121 N. W. 714; British-American Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; Granger v. Manchester F. Ins. Co., 119 Mich. 177, 77 N. W. 693; Carpenter v. Continental Ins. Co., 62 Mich. 140, 28 N. W. 749; Marthinson v. North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291; Parsons v. Knoxville F. Ins. Co., 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; Bowen v. Hanover F. Ins. Co., 69 Mo. App. 272; McCollum v. Niagara F. Ins. Co., 61 Mo. App. 352; Home F. Ins. Co. v. Phelps, 51 Neb. 623, 71 N. W. 303; Home F. Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Walker v. Phoenix Ins. Co., 130 N. Y. 564, 29 N. E. 992; Armstrong v. Ins. Co., 156 N. Y. 633, 51 N. E. 392; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; McFarland v. Kittaning Ins. Co., 134 Pa. St. 590, 19 Atl. 766, 19 Am. St. Rep. 723; Niagara F. Ins. Co. v. Miller, 120 Pa. St. 504, 14 Atl. 385; German, etc., Ins. Co. v. Evants, 25 Tex. Civ. App. 300, 61 S. W. 536; Roberts v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Georgia Ins. Co. v. Goode, 95 Va. 751, 30 So. 366; Jerdee v. Cottage Grove Ins. Co., 75 Wis. 345, 44 N. W. 636; Oskosh Gas Co. v. Germania F. Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; Cannon v. Home Ins. Co., 53 Wis. 585, 11 N. W. 11.

of hybrid, which is termed either waiver or estoppel indiscriminately. Though we find statements in the cases that, since forfeitures are not favored, a waiver of a forfeiture may be sustained by circumstances which do not present the strong equities required to create an estoppel;[5] that the test is whether the conduct of the insurer was, under the circumstances, consistent with the intention to insist upon the forfeiture;[6] and that any conduct by the insurer reasonably warranting the belief in the insured that the insurer had intentionally relinquished its right to insist upon a forfeiture will constitute a waiver,[7] we must remember that at least some of the elements of estoppel must be present—that is, the insured must have been put to some trouble and expense in the reasonable belief that the forfeiture had been waived, or in some other way be put in such a position that it would not be fair to him for the company to insist upon the forfeiture. It is believed that there is not a single case where a mere waiver unaccompanied by any of the elements of estoppel was held to be enough. The insured must have gone to some trouble or expense in reliance upon the waiver, or in some way have placed himself in a position such that for the company afterwards to insist upon the forfeiture would be unconscionable.

IV. *Application of Rule.*—(a) Rule Applicable.—The rule is applicable to any kind of insurance, whether property insurance,[8] life insurance[9] or fidelity insurance.[10] Any of the conditions of the policy may be waived in this way. Thus, if after the loss the adjuster learns that the insured had procured other insurance on the property, but, instead of denying liability for that reason, proceeds to investigate the loss, negotiates with the insured in an effort to adjust the amount of the loss, puts the insured to the expense and trouble of furnishing proofs of loss and plans of the building destroyed or duplicate invoices of merchandise destroyed, etc., etc., the company will then and thereby be estopped from relying upon the clause against additional insurance as a defense when sued upon the policy.[11] Likewise as to the condition against change of title,[12] encumbrances,[13] increase of risk,[14] vacancy,[15] the iron-safe clause[16] and false warranties in the application.[17]

(5) Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774; Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89.

(6) Tuttle v. Iowa State Traveling Men's Ass'n, 132 Iowa 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223.

(7) Currie v. Cont'l Casualty Co., 147 Iowa 281, 126 N. W. 164, 140 Am. St. Rep. 300.

(8) Cleaver v. Traders Ins. Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; Rudd v. American, etc., Ins. Co., 120 Mo. App. 1, 96 S. W. 237. Also cases in note four.

(9) Supreme Tent K. M. v. Volkert, 25 Ind. App. 627, 57 N. E. 203; Kidder v. Knight Templars, etc., Ins. Co., 94 Wis. 538, 69 N. W. 364.

(10) Crystal Ice Co. v. United Surety Co., 159 Mich. 102. 123 N. W. 619.

(11) Cleaver v. Traders Ins. Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; Carpenter v. Continental Ins. Co., 62 Mich. 140, 28 N. W. 749; Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633; Replogle v. American Ins. Co., 132 Ind. 360, 31 N. E. 947; Webster v. Phoenix Ins. Co., 36 Wis. 67, 17 Am. Rep. 479; Cannon v. Home Ins. Co., 53 Wis. 585, 11 N. W. 11; British-American Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

(12) Granger v. Manchester F. Assur. Co., 119 Mich. 177, 77 N. W. 693; Hollis v. State Ins. Co., 65 Iowa, 454, 21 N. W. 774; Scottish Union, etc., Ins. Co. v. Colvard, 135 Ga. 188, 68 S. E. 1097.

(13) McFarland v. Kittaning Ins. Co., 134 Pa. St. 590, 19 Atl. 766, 19 Am. St. Rep. 723; Niagara F. Ins. Co. v. Miller, 120 Pa. St. 504, 14 Atl. 385; Titus v. Geins Falls Ins. Co., 81 N. Y. 410; Armstrong v. Ins. Co., 156 N. Y. 633, 51 N. E. 392; Walker v. Phoenix Ins. Co., 130 N. Y. 564, 29 N. E. 992.

(14) Home F. Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521; Roby v. Ins. Co., 120 N. Y. 510, 24 N. E. 808.

(15) Gans v. St. Paul Ins. Co., 43 Wis. 108, 28 Am. Rep. 535; Jerdee v. Cottage Grove F. Ins. Co., 75 Wis. 345, 44 N. W. 636; Home F. Ins. Co. v. Phelps, 51 Neb. 623, 71 N. W. 303; Hanscom v. Home Ins. Co., 90 Me. 333, 38 Atl. 324; German-American Ins. Co. v. Evants, 25 Tex. Civ. App. 300, 61 S. W. 536.

(16) Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89; Marthinson v. North-British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291; Brown v. State Ins. Co., 74 Iowa 428, 38 N. W. 135, 7 Am. St. Rep. 495; Parsons v. Knoxville F. Ins. Co., 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; Roberts v. Sun Mutual Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Henderson v. Standard F. Ins. Co., 143 Iowa 572, 121 N. W. 714; McCollom v. Niagrara F. Ins. Co., 61 Mo. App. 352; Bowen v. Hanover F. Ins. Co., 69 Mo. App. 272; Corson v. Anchor, etc., Ins. Co., 113 Iowa 641, 85 N. W. 806.

(17) Hartford F. Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393; German Ins. Co. v. Gibson, 33

B. Rule Not Applicable.—It has been held that the rule does not apply where the loss is occasioned by a cause not insured against, that is, from a cause excepted from the policy.[18] Thus where a policy of life insurance provided that the company would not be liable in case insured's death should be caused by pregnancy, it was held that the company was not estopped from denying liability because it had demanded proofs of death after knowledge that the death of the insured was caused by pregnancy, even though the proofs were prepared at considerable expense, because this is not analogous to forfeiture for breach of condition, but here the deceased was not insured against death from pregnancy.[19]

Neither does the rule apply where, the requiring of further proofs being the conduct relied upon to constitute the alleged waiver, it appears that such proofs were necessary for the company to determine whether it was liable under the policy.[20] Thus where the by-laws of a mutual benefit association provided that no one over the age of forty-five was eligible to membership, and the applicant had stated in his application that he was at that time forty-four years of age, but the proofs of loss showed that the member must have been more than forty-five at the time, it was held that the company was not estopped from denying liability on account of the over-age of the insured by merely suggesting to the beneficiary that she select some attorney with whom it could take up the matter as to the discrepancies as to the age of the deceased.[21]

V. *Qualifications and Exceptions.*—*A. Knowledge of the Forfeiture.*—Since waiver is "the intentional relinquishment of a known right,"[22] it is patent that the insured cannot claim a waiver unless he has shown that the insurer knew of the breach of condition at the time of the conduct which he relies upon to constitute waiver.[23] It is not material from what source the insurer learns of the breach of condition,[24] but it seems that the information must be such as should satisfy the company of the fact of breach and not leave it a question to be settled by further investigation.[25]

B. Specific Conduct Which Does Not Amount to Waiver.—Merely sending blanks for proof of loss at the request and instance of the insured will not amount to waiver where the company writes a letter, at the time of sending, blanks, pointing out specifically the breach of condition it intends to insist upon and expressly reserving all their rights in the premises. Such conduct is held to be only a favor to the insured, and is not at all inconsistent with an intent to rely upon the forfeiture in question.[26]

The mere fact that the company sent its adjuster to investigate a loss is not sufficient to constitute a waiver, even though the adjuster visits the *locus* of the fire, and voluntarily takes preliminary steps of investigation.[27]

Ark. 494, 14 S. W. 672; Farmers, etc., Ins. Co. v. Chestnut, 50 Ill. 111, 99 Am. Dec. 492; Contra: Boyd v. Ins. Co., 90 Tenn. 213, 25 Am. St. Rep. 676.

(18) Draper v. Oswego F. R. Asso., 190 N. Y. 12, 82 N. E. 755.

(19) Knights, etc., of C. v. Shoaf, 166 Ind. 367, 77 N. E. 738.

(20) Fitchpatrick v. Ins. Co., 53 Iowa, 335, 5 N. W. 151.

(21) Taylor v. Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408, 3 L. R. A. (N. S.) 114.

(22) Aronson v. Franklin, etc., Ins. Co., 9 Cal. App. 473, 99 Pac. 537; Currie v. Continental Casualty Co., 147 Iowa, 281, 126 N. W. 164, 140 Am. St. Rep. 300.

(23) Firemens F. Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 37 C. C. A. 96; Planters Mut. Ins. Co. v. Loyd, 67 Ark. 588, 56 S. W. 44, 77 Am. St. Rep. 136; American C. Ins. Co. v. Antram, 86 Miss. 224, 38 So. 626; Alston v. Northwestern, etc., Ins. Co., 7 Kan. App. 179, 53 Pac. 784; Freedman v. Fire Asso., 168 Pa. 249, 32 Atl. 39; Spann v. Phoenix Ins. Co., 83 S. C. 262, 65 S. E. 232.

(24) Rundell v. Anchor F. Ins. Co., 128 Iowa, 575, 105 N. W. 112, 25 L. R. A. (N. S.) 20.

(25) Taylor v. Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408, 3 L. R. A. (N. S.) 114; Fitchpatrick v. Ins. Co., 53 Iowa, 335, 5 N. W. 151.

(26) Roth v. Mutual Reserve L. Ins. Co., 162 Fed. 282, 89 C. C. A. 262; Elhart v. Pacific Mutual L. Ins. Co., 47 Wash. 609, 92 Pac. 419; Tuttle v. Iowa State Traveling Men's Asso., 132 Iowa, 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223.

(27) Bakhaus v. Germania F. Ins. Co., 176 Fed. 879, 100 C. C. A. 349; Burnham v. Royal Ins. Co., 75 Mo. App. 394.

Silence on the part of the company after a loss and after knowledge of a breach of condition is not sufficient to constitute a waiver of the forfeiture,—there must be some affirmative action by the company.[28]

It has been held that in the absence of any other trouble or expense the mere fact that the insured signed an affidavit relative to the amount of the loss, which had been prepared by the company.[29]

A mere, unaccepted offer to compromise, made after knowledge of a forfeiture, does not of itself constitute a waiver of the forfeiture,[30] but a completed and valid compromise is binding, of course, and waives known forfeitures.[31] And it has been held, further, that a compromise payment by an adjuster, with knowledge of a forfeiture, is conclusive evidence of a waiver, and a receipt given by the insured reciting that he had received "payment in full" may be set aside for fraud and undue influence, and the insurer recover the full amount of his loss under the policy, notwithstanding a forfeiture of the policy, because the previous compromise payment operated as a waiver of the forfeiture in question.[32]

VI. *Effect of Stipulations Against Waiver.—A. Stipulations in the Policy.*—Most, if not all, policies provide that the insured shall furnish proofs of loss, and in a California case[33] it was held that the transactions and investigations as to the loss cannot be taken as a waiver by the company, even though the company knew of a forfeiture at the time, but remained silent, and allowed the insured to incur considerable expense and trouble in the matter of furnishing proofs, because, the court said, this was required by the policy and the furnishing of such proofs was merely the fulfilling of the obligations stipulated for by the insured. This case is contrary to the weight of authority, as well as unsound on principle.[34] On this point, Sherwin, Ch. J., of the Supreme Court of Iowa,[35] said: "The appellant contends, however, that the plaintiffs were bound to send in their proofs of loss, and that Kikham (the adjuster) did not therefore induce them to incur any expense or trouble which they need not have incurred. The fallacy of this argument is apparent, when we consider the fact that the plaintiffs knew, as well as the defendant, the condition of the contract, and that they could not recover thereon because of the loss of their books and inventories (breach of the iron-safe clause), and that, such being the case, they need not have incurred the expense of sending proofs of loss."

As to the provision, common in all policies, that no condition of the policy can be waived except in writing, and then, possibly, only by certain specified officers of the company, suffice it to say, without citing any authorities (which are abundant and practically uniform to the point) that the same conduct on the part of the adjuster and the company which waives the forfeiture waives also this provision of the policy.

But policies often contain a further stipulation that the furnishing of proofs, appraisal of loss, and negotiations between the insured and the adjuster shall not be held to constitute a waiver of any of the conditions of the policy. Such stipulations appear to be valid and efficacious, so that the conduct of the adjuster, coming within the terms of the stipulation, is referable

(28) Gibson Electric Co. v. Liverpool, etc., Ins. Co., 159 N. Y. 419, 54 N. E. 23; Queen Ins. Co. v. Young, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51; Phoenix Ins. Co. v. Stevenson, 78 Ky. 157.

(29) McCormick v. Springfield, etc., Ins. Co., 66 Cal. 364, 5 Pac. 619.

(30) Richards v. Continental Ins. Co., 83 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611.

(31) Farmers Ins. Co. v. Chestnut, 50 Ill. 111 99 Am. Rep. 492; Rudd v. American, etc., Ins. Co., 120 Mo. App. 1, 96 S. W. 237; Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89.

(32) Industrial, etc., Ins. Co. v. Thompson, 83 Ark. 575, 104 S. W. 200, 119 Am. St. Rep. 149.

(33) McCormick v. Orient Ins. Co., 86 Cal. 260, 24 Pac. 1003.

(34) Webster v. Phoenix Ins. Co., 36 Wis. 67, 17 Am. Rep. 479.

(35) Rundell v. Anchor F. Ins. Co., 128 Iowa, 575, 105 N. W. 112, 25 L. R. A. (N. S.) 20.

thereto, and cannot be relied upon to constitute a waiver, even though the adjuster had knowledge of the forfeiture at the time and the insured was put to expense and trouble in the matter.[36]

B. Stipulations Against Waiver Contained in Form Used for Making Proof of Loss.—Where the blanks furnished by the insured contain a provision against waiver, and the proof is made out upon such blank and signed by the insured, the effect is the same as if such stipulations were contained in the policy itself.[37] Thus where, in the proofs of loss made out upon blanks furnished by the company and signed by the insured there appeared a stipulation that "the furnishing of this blank to assured, or making up of proofs by the adjuster for the company is not to be considered as a waiver of any rights of the company," it was held that the insured was estopped from relying upon the conduct of the adjuster to show a waiver of a known forfeiture.[38]

C. Extraneous Non-Waiver Agreements.—Where, after the loss and before any steps toward adjustment are taken, the insured and the company, by the adjuster, enter a mutual written agreement that the conduct of the insurer in investigating the fire and adjusting the loss shall not be considered an acknowledgment of liability of the company, nor a waiver of any of the conditions of the policy, the insured is precluded from relying upon any subsequent conduct of the adjuster, which comes fairly within the terms of such agreement to constitute a waiver of any of the conditions of the policy, even though the adjuster knew of the breach before any such steps of investigation and adjustment were taken, and the insured was put to trouble and expense in the matter.[39] Such agreements, if fairly entered into, are valid, and are admissible in evidence for the purpose of showing the intention of the parties and to counteract any interference of waiver which might be drawn from the conduct of the adjuster but for the non-waiver agreement.[40]

Such agreements, however, are to be strictly construed against the company, and the terms thereof will not be enlarged to include and protect the company against conduct which is not clearly within the terms of the agreement.[41]

VII. *Saving Declarations.—A. Written Declartions.*—Where all the other elements of the rule are present the company cannot protect itself against its conduct in such cases by adding, in letters from it to insured with reference to the adjustment of the loss, a statement that it is not waiving any of its rights and defenses under the policy, but not pointing out any particular forfeiture and denying liability.[42]

B. Oral Declarations.—And the same is true with respect to oral declarations made by the adjuster.[43] In a Texas case[44] it appeared that after learning of the breach of the iron safe clause desired that the insured sign a non-waiver agreement to protect the company against inference of waiv-

(36) American, etc., Ins. Co. v. Nunn, 98 Tex. 191, 82 S. W. 497, 68 L. R. A. 83; Holbrook v. Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555; Oskosh Match Works v. Manchester F. Assur. Co., 92 Wis. 510, 66 N. W. 525; Phoenix Ins. Co. v. Flemming 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900.

(37) Curlee v. Texas, etc., Ins. Co., 31 Tex. Civ. App. 471, 73 S. W. 831; Hayes v. Ins. Co., 132 N. C. 703, 44 S. E. 404.

(38) Joye v. South Carolina, etc., Ins. Co., 54 S. C. 371, 32 S. E. 446.

(39) Shawnee F. Ins. Co. v. Knerr, 72 Kan. 385, 83 Pac. 611; Flether v. Minneapolis, etc., Ins. Co., 80 Minn. 152, 83 N. W. 29; Roberts v. Sun, etc., Ins. Co., 19 Tex. Civ. App. 338, 48 S. W. 559; Queen Ins. Co. v. Young, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51; Phoenix Ins. Co. v. Stahl, 72 Kan. 578, 83 Pac. 614; Holbrook v. Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555.

(40) Sun Ins. Co. v. Dudley, 65 Ark. 240, 45 S. W. 539; Keet-Roundtree D. G. Co. v. Mercantile, etc., Ins. Co., 100 Mo. App. 504, 74 S. W. 469. Also the cases cited in note "(39)". Contra: Corson v. Anchor, etc., Ins. Co., 113 Iowa 641, 85 N. W. 806.

(41) Rudd v. American, etc., Ins. Co., 120 Mo. App. 1, 96 S. W. 237; McCollough v. Home Ins. Co., 155 Cal. 659, 102 Pac. 814.

(42) Marthinson v. North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291; Home Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521.

(43) German Ins. Co. v. Allen, 67 Kan. 729, 77 Pac. 529.

(44) German, etc., Ins. Co. v. Evants, 25 Tex. Civ. App. 300, 61 S. W. 536.

er that might result from his investigation of the loss and negotiations toward adjustment. This the insured refused to do, whereupon the adjuster stoutly declared that whatever steps in the matter might be taken, he wanted it distinctly understood that none of the terms of the policy were to be considered as waived, and that the company reserved all its defenses against liability. In discussing the point the court said: "This (demanding proofs of loss and duplicate invoices, after a knowledge of the breach of the iron-safe clause) must be treated as an election to waive the forfeiture and hold the policy valid, notwithstanding he declared at the time he was not waiving it. The adjuster in this case is to be commended for his efforts to avail himself of both horns of the dilemma, and his faithful struggle to that end reminds us not a little of Byron's description of how Julia did it under an equally pressing emergency:

'A little still she strove, and much repented,
'And, whispering "I will ne'er consent,"
consented.'

His acts were totally inconsistent with his words, and in common affairs of men they say 'actions speak louder than words," and sometimes the law takes the same sensible view of the proposition."

VIII. *Pleading and Practice.—A. Pleading.*—Waiver of a condition precedent must be pleaded in the plaintiff's petition, and where performance is alleged in the petition, facts tending to show waiver are inadmissible,[45] but since forfeiture for breach of condition subsequent or a promissory warranty is an affirmative defense to be set up by the company, the plaintiff need not anticipate this defense by pleading waiver in his petition, but may set up facts showing waiver of such condition in his reply.[46]

B. Question of Fact.—The question of waiver is ordinarily one of fact to be decided by the jury,[47] but it, like other questions of fact, is also a question of law in this respect, namely, that the court must first decide whether there is any competent evidence of waiver in the case, and, if not, the question of waiver should not be left to the jury.[48] On the other hand where the evidence is strong enough the court may instruct the jury that as a matter of law the insurer waived the forfeiture.[49]

C. Burden of Proof.—The burden of proof is upon the plaintiff to show such facts as will amount to waiver.[50]

D. Instructions: Form of.—Instructions submitting the question of waiver must, of course, fit the facts of the particular case, but the following form, approved by the Supreme Court of Wisconsin, furnishes a general idea as to form and content of such instructions: "If you find that such adjuster was the agent of the defendant, and, with knowledge of the fact (setting out what facts relied upon now by the company to show forfeiture), and without insisting upon the forfeiture, continued to recognize the validity of the policy, and entered into negotiations for and efforts at a settlement of such loss, whereby plaintiffs incurred expense or trouble, then there was a waiver of such forfeiture."[51]

E. Appeal and Error.—The theory of a case cannot be shifted on appeal, so where a case was tried on the theory of waiver of a known forfeiture, such must be the theory on appeal, and the issue of non-forfeiture cannot then be raised on appeal.[52] Obviously the converse of this proposition would be true, that is, if case was tried on theory of non-forfeiture, the same must be considered the issue on appeal, and it would not be allowable to present the facts on appeal as showing a waiver of the forfeiture.

CLYDE MCLEMORE.

Muskogee, Okla.

(45) Aronson v. Frankfort, etc., Ins. Co., 9 Cal. App. 473, 99 Pac. 537.

(46) Tillis v. Liverpool, etc., Ins. Co., 46 Fla. 268, 35 So. 171, 110 Am. St. Rep. 89.

(47) Taylor v. Anchor, etc., Ins. Co., 116 Iowa 635, 88 N. W. 807, 57 L. R. A. 329, 93 Am. St. Rep. 261; Gish v. Ins. Co., 16 Okla. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826; Walker v. Phoenix Ins. Co., 156 N. Y. 633, 51 N. E. 392.

(48) Keet-Roundtree D. G. Co. v. Mercantile etc., Ins. Co., 100 Mo. App. 504, 74 S. W. 469.

(49) Marthinson v. North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291.

(50) Planters, etc., Ins. Co. v. Loyd, 67 Ark. 588, 56 S. W. 44, 77 Am. St. Rep. 136.

(51) Oshkosh Gas Light Co. v. Germania F. Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233.

(52) Industrial, etc., Ind. Co. v. Thompson, 83 Ark. 575, 104 S. W. 200, 119 Am. St. Rep. 149.

EVIDENCE—HANDWRITING.

COCHRAN v. STEIN et al.

Supreme Court of Minnesota, June 28, 1912.

136 N. W. 1037.

(Syllabus by the Court.)

Where the genuineness of handwriting is in issue, specimens of handwriting, admitted or proved to be genuine, are admissible for the purpose of comparison.

PHILIP E. BROWN, J.: Action to recover the amount claimed to be due on a negotiable promissory note by an alleged bona fide purchaser thereof. Defense, a denial of the plaintiff's alleged bona fide holdership, and allegations, in substance, that the note was obtained by fraud. The case was tried to a jury, and the defendants had a verdict. This is an appeal from an order denying the plaintiff's motion, in the alternative, for a judgment notwithstanding the verdict or for a new trial.

It appeared on the trial that the defendants, on September 16, 1903, executed their negotiable promissory note, dated on that day, therein promising to pay to O'Connell & White, or order, $867, on July 1, 1906, which note had been indorsed, without recourse, by the said O'Connell & White to this plaintiff. The plaintiff there claimed that he purchased the note from the payees in February, 1904, for value, in due course of business, without notice, and that it was then and there indorsed by them to him. All of these claims the defendants denied, and claimed especially that the note was not indorsed until after its maturity.

The plaintiff made the following concession on the trial: The note referred to was given to O'Connell & White for a part of the purchase price of a stallion named Royal, sold by them to the defendants; the note was obtained by them from the defendants by fraudulent representations, relied upon by the defendants, as to the breeding qualities of the animal, and which were then known to O'Connell & White to be untrue; that the horse was of no value as a breeder, which was the purpose for which he was sold to the defendants, and was returned by the defendants to O'Connell & White in May, 1904, and was retained by them; and, further, that as against O'Connell & White these defendants have a defense to the note in suit upon the grounds above stated.

The plaintiff has 21 assignments of error, 20 of which are based upon his contention that it was conclusively established on the trial that he was a bona fide purchaser and holder of the note from the payees—which claim he concedes is the only issue in the case—and these 20 assignments may be grouped and require no separate discussion. The other assignment will be adverted to later.

(1, 2) 1. Immediately after the plaintiff's concession, made on the trial and above referred to, to the effect that the note in suit had been obtained by fraud from the defendants, the burden was placed upon him to establish his claim that he purchased the note from the payees for value, before maturity, in due course of business, and without notice. Park v. Winsor, 115 Minn. 256, 132 N. W. 264. And the phrase "in due course of business" required proof on his part sufficient to fairly satisfy the jury that the note was indorsed to him by O'Connell & White before its maturity, to entitle him to recover in this action; for one who takes negotiable paper, payable to order, otherwise than by indorsement, does not take it in due course of business, and hence is not a bona fide holder. Dunnell, Minn. Dig. §§ 951, 929.

(3) As before stated, the plaintiff claims that the note in suit was indorsed to him in February, 1904, while the defendants deny that the plaintiff was a bona fide purchaser, and specifically claim that the note was not indorsed by the payees, O'Connell & White, until after July 1, 1906, the date when the note matured. After careful consideration of the evidence, we have concluded that so far as the sufficiency thereof is concerned, to sustain the verdict, the only question necessary to discuss or determine is the claim of the plaintiff that he purchased the note from, and also that it was indorsed to him by, the payees before maturity. It would serve no useful purpose to attempt to detail the testimony on these questions. The plaintiff testified that he purchased the note, and that it was indorsed to him by the payees therein named, in the early part of February, 1904. His testimony in the latter regard was corroborated by that of his wife, attorney, and stenographer, and also by that of a money lender of Crawfordsville, Ind., the

place of the plaintiff's residence, and also by the cashier of the First National Bank of St. Cloud. For the defendants' testimony was offered by two of them tending to show that between the 12th and 20th of July, 1906, and after the maturity of the note, the plaintiff admitted that his negotiations for the purchase of the note were not closed with O'Connell & White, and two of the defendants testified that they saw the note at the time last mentioned, and that it did not then bear the indorsement of O'Connell & White. Furthermore, a witness one Keller, who had been the cashier of a bank at Albany, in this state, for about 14 years, testified that in November, 1906, he received through the mails, a letter, purporting to be from the plaintiff, written in longhand, and signed with his name, from Crawfordsville, Ind., which, shortly after its receipt, he exhibited to John Gates, one of the defendants in this action, but that this letter was subsequently lost. He further testified that in his opinion the letter, including the signature, was in the plaintiff's handwriting, and that it in effect requested him to advise the plaintiff concerning the financial responsibility of these defendants, and stated that he, the plaintiff, was contemplating the purchase of the note here involved, and desired information concerning the standing of the defendants before closing the deal. This testimony was corroborated by that of Gates to the extent that in November, 1906, a letter was shown him by Keller purporting to have been signed by the plaintiff. Other evidentiary facts not necessary to state, favorable to the defendants' theory generally, appeared. Under all of the evidence above summarized, remembering that the burden rested on the plaintiff to establish the fact that he was a bona fide purchaser of the note, we think it clear, and hold, that the issue was for the jury to determine, and that it does not so clearly appear from the evidence that the plaintiff acquired the note, as he claims, that a different inference could not reasonably be drawn therefrom.

(4, 5) 2. The plaintiff claims, however, that the ruling of the court admitting Keller's testimony concerning the receipt and contents of the letter before referred to, and the plaintiff's signature thereto, was error—and this is the separate assignment of error above referred to—and it may be conceded, for the purpose of this discussion, that, if error it was, such was prejudicial to the extent of constituting it reversible error. In addition to the facts above stated, concerning this testimony, it appeared that the witness Keller was shown, both on the trial and shortly prior to his testifying, several writings admittedly made by the plaintiff, with his genuine signature appended thereto, and he was allowed to testify, over the objection and exception of the plaintiff, that the said letter was written and signed by the plaintiff. Aside from the fact that the witness had been engaged in the banking business, as stated, for about 14 years, there was no evidence of his special qualification to testify upon the question of the identity of handwritings, and it was conceded that he had never seen any of the plaintiff's handwriting prior to the receipt of the said letter, and there was no evidence that he saw any of the same thereafter until the above-mentioned exhibits were submitted to him, or that he ever received any other written communication from the plaintiff, or purporting to be from him. The witness had never seen the plaintiff write.

The question involved, as stated in Hammond v. Wolf, 78 Iowa, 232, 42 N. W. 779, the leading case on the point here involved, is as follows: "Is the opinion of a witness as to the genuineness of a disputed lost signature, which he has seen, based upon a comparison of his recollection of it with a signature of the same person in evidence, and admitted to be genuine, competent?" While this precise point has never been decided in this state, our decisions, we think clearly foreshadow the rule which should be adopted. This court has held that, on the trial of an issue as to the genuineness of certain handwriting, instruments concededly genuine are admissible in evidence for the purpose of comparison. Morrison v. Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331. It has further been held that "to render a witness competent to testify as to the genuineness of the signature of another, as one having personal acquaintance with his handwriting, it is not necessary that he should have seen the party write. Such personal acquaintance may be acquired by having seen papers, purporting to be the handwriting of the party, and which he has acknowledged or acquiesced in as being genuine." Berg v. Peterson, 49 Minn. 420, 52 N. W. 37. And in the Morrison Case, supra, it was stated (35 Minn., at page 426, 29 N. W., at page 54, 59 Am. Rep. 331): "In general, and from necessity, the authenticity of handwriting must be subject to proof by comparison of some sort, or by testimony which is based upon comparison between the writing in question and that which is in some manner recognized or shown to be genuine. This is everywhere allowed, through the opinions of the witnesses who have acquired a knowledge, more or less complete, of the

handwriting of a person, as by having seen him write, or from acquaintance with papers authenticated as genuine. In such cases the conception of the handwriting retained in the mind of the witness becomes a standard for comparison, by reference to which his opinion is formed and given in evidence."

The principal ground upon which the plaintiff bases his claim that this testimony was incompetent is that it was necessary for the witness Keller to have been acquainted with the plaintiff's signature at the time of his receipt of the alleged letter, to warrant his testimony to its genuineness. We hold that no such qualification should be attached to the rule, and that the court did not err in admitting the testimony; the plaintiff's objections going merely to the weight, and not to the competency, thereof. We are unable to perceive, on principle, why the question of the competency of the witness should depend upon the witness' previous, instead of his subsequent knowledge of the handwriting of the person whose handwriting is in controversy. In the note to University of Illinois v. Spalding, 62 L. R. A. 817, 873, this question is discussed as follows: "A kind of comparison distinct from that hitherto treated is that used to establish the handwriting of instruments which have been lost, or are otherwise incapable of being produced in court. This comparison, of a mental exemplar in the mind of the witness of the character of the disputed handwriting, which is not present in court, with proved specimens which are present, is, it will be seen, the converse of that common method of proof of handwriting hitherto spoken of as pseudo comparison, namely, comparison of the disputed writing, which is present in court, with the mental exemplar, retained by the witnesses, of other writings which are not so present, and it would seem that the same rules would properly apply to both."

It is true that there is some conflict of authority on this question; but we think that both reason and the weight of authority sustain the rule above announced. Hammond v. Wolf, supra; State v. Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Redd v. State, 65 Ark. 475, 47 S. W. 119. The question of the competency of an expert rests largely in the discretion of the trial court. McDonough v. Cameron, 134 N. W. 118. We find no reason for interfering with the verdict on this ground.

Order affirmed.

NOTE.—*Admissibility of Writings Otherwise Irrelevant for Comparison of Handwriting.*—The principal case seems to be more supported by late than earlier cases. Among late cases opposed to the principal case are those from Alabama and Texas. As favoring admissibility may be placed Idaho, Nebraska, North Carolina, Pennsylvania, South Carolina, South Dakota and Vermont; though, generally, it may be said it will not be allowed greatly to go into this matter as a collateral issue.

In one of the Alabama cases the court said: "A writing, although admitted to be genuine, when not otherwise relevant and admissible in evidence, is not admissible for the sole purpose of instituting a comparison of handwriting, whether by the jury trying the case, or for the expression of an opinion by one examined as an expert witness." Griffin v. Working Women's Asso., 151 Ala. 597, 44 So. 605.

In Texas, the Court of Civil Appeals thus speaks of the matter: "The rule in England is that it is not competent to prove handwriting by a comparison of hands. The authorities in this country are conflicting. The English rule seems to have been adopted in this state. Such was the holding of our supreme court in the able opinion of Judge Donley, in the case of Handley v. Gandy, 28 Tex. 211, 91 Am. Dec. 315. This rule has been so far modified as to permit the jury from an examination of papers already before them and already in the case to determine for themselves whether the writing in controversy is genuine. Kennedy v. Upshaw, 64 Tex. 411. However, papers, although they contain the defendant's genuine signature, but which are not otherwise relevant to the case, are not admissible in evidence as a basis of comparison to prove the genuineness of the defendant's signature to the note in suit." Brin v. Gale, 135 S. W. 1133.

In Mississippi Lumber and Coal Co. v. Kelly, 19 S. D. 577, 104 N. W. 265, 9 Am. & Eng. Anno. Cas. 449, and the note thereto in the last mentioned volume, there are given a number of cases *pro* and *con* on this subject. Therein it is stated that: "The general tendency of the recent decisions is in relaxation of the earlier rule prevailing in some jurisdictions, under which such evidence was excluded absolutely, and the admissions of irrelevant papers for the purpose of comparison." This language is quoted and the court then adds there is conflict about this. It also guardedly says: "In the admission of such a paper for the purpose of comparison, and not properly in evidence for other purposes, the court should be exceedingly careful not to allow any writing to go to the jury which might possibly influence them in the case on trial before them, and where there is any matter in the writing that might have such effect, the paper should be excluded."

In Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963, the question of a collateral issue being raised on an offered document is presented and because admission of genuineness was denied it was excluded.

In South Carolina a presumption of genuineness, as, for example, a record filed in a public office, presumably written by the incumbent thereof, was held admissible for comparison. McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 1078, 7 L. R. A. (N. S.) 433, 7 A. & E. Ann. Cas. 693.

In Groff v. Groff, 209 Pa. 603, 59 Atl. 65, the decision confines itself to saying that an admit-

tedly genuine lead pencil signature was admissible for comparison.

An exhaustive note on this question is found in 62 L. R. A. 817, in its report of the case of University of Illinois v. Spalding, 71 N. H. 163, 51 Atl. 731.

That case shows that writings for comparison were admissible only at common law when the writing in issue was so ancient as not to admit of proof based on knowledge derived from seeing the party write or its equivalent. Then it is recited that the tendency of decision is away from this narrow rule and New Hampshire decision is then traced. It is said: "The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison, in any proper sense. * * * The jury should not be required or permitted to make comparison with disputed standards, and to settle for themselves the collateral question of the genuineness of the standards. Such a practice is not only indefensible in practice, but it is against judicial and legislative opinion of the world." C.

BOOKS RECEIVED.

The World's Legal Philosophies, by Fritz Berolzheimer, President of the International Society of Legal and Economics Philosophy at Berlin. Translated from the German by Rachel Szold Jastrow, of Madison, Wisconsin, with an introduction by Sir John Macdonell, Professor of Comparative Law in University College, London, and by Albert Kocourek, Lecturer on Jurisprudence in Northwestern University. Boston, Mass. Boston Book Company. Review will follow.

Proceedings of the Eighteenth Annual Session of the Iowa State Bar Association, held in Cedar Rapids, Iowa, June 27th and 28th, 1912.

New Hampshire Insurance Reports, Sixty-first Annual Report of the Insurance Commissioner of the State of New Hampshire, 1912.

American Annotated Cases, containing the cases of general value and authority subsequent to those contained in American Decisions, American Reports and the American State Reports. Thoroughly Annotated Volume Ann. Cas. 1912, C, Northport, L. I. N. Y. Edward Thompson and San Francisco, Bancroft-Whitney Co. Review will follow.

BOOK REVIEWS.

ANALYSIS OF SNELL'S EQUITY, 10TH EDITION.

This work is "intended as a companion to Snell's work, with which it is to be read chapter by chapter." The author has in view the fuller comprehension of Snell's work by students, especially in their preparations for examinations.

The English view of fitting one to become a practitioner is greatly different from the American, and supposed to contemplate a more thorough equipment on entrance into professional life. Its author is Mr. E. E. Blyth, B. A. L. L. D. Solicitor, and just as Snell's is one of the standards, correspondingly may it be, thought its companion serves a very acceptable purpose. The analysis is of the Sixteenth Edition of Snell and is published by Stevens & Haynes Law Publishers, London, 1912.

COLLIER ON BANKRUPTCY, 9TH EDITION.

This standard work whose first and second editions were by Mr. Wm. Miller Collier, respectively of 1898 and 1900, now has reached its ninth edition, the later editors having adopted his method.

This latest edition amplifies by more extensive discussion of many of the troublesome questions which have arisen in the life of the bankruptcy act. Then, too, amendments have come in and opinions have caused a great increase in the notes to the text of the work.

This edition shows reports of cases to the end of volume 27 American Bankruptcy Reports, and 194 Federal Reporter, and cases are reported from volume 224 U. S. Supreme Court Reports.

The treatment in this work is so familiar to the profession, that praise would be stale. It is a book that is regarded as a necessity to a lawyer practicing in bankruptcy and what is there to say, if this is true?

This edition is somewhat more bulky than its predecessors and the edition is bound in buckram and published by Matthew Bender & Co., Albany, N. Y., 1912.

HUMOR OF THE LAW.

Aunt Caroline and the partner of her woes evidently found connubial bliss a misnomer, for the sounds of war were often heard down in the little cabin in the hollow. Finally the pair were haled into court, and the dusky lady entered a charge of abusive language against her spouse. The judge, who had known them both all his life, endeavored to pour oil on the troubled waters.

"What did he say to you, Caroline?" he asked.

"Why, Jedge, I jes' cain't tell you all dat man do say to me."

"Does he ever use hard language?"

"Does yo' mean cussin'? Yassuh, not wif his mouf, but he's always givin' me dem cussory glances."—Lippincott's Magazine.

"I will ask you," said the lawyer, who was trying to throw doubts on the testimony of a witness, "if you have ever been indicted for any offense against the law?"

"I never have, sir."

"Have you ever been arrested on a charge of any kind?"

"Never."

"Well, have you ever been suspected of committing a crime?"

"I'd rather not answer that question."

"Ha! You would rather not. I thought so. I insist upon your answering it. Have you ever been suspected of crime?"

"Yes, sir; often. Every time I come home from a trip abroad the customs inspectors at New York city suspect me of being a smuggler."—Chicago Tribune.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Arbitration and Award**—Vitiating.—A mistake in the admission of evidence by arbitrators in a statutory arbitration will not vitiate an award.—Beall v. Board of Trade of Kansas City, Mo., 148 S. W. 386.

2. **Attorney and Client**—Attorney's Lien.—The attorneys' lien law is not unconstitutional as depriving persons against whom suits are brought or claims are held of their constitutional and property right to buy their peace by making contracts of settlement.—Standige v. Chicago Rys. Co., Ill., 98 N. E. 963.

3. **Bankruptcy**—Jurisdiction.—Where a part of the subject-matter of a petition filed by a trustee before a reference is within the jurisdiction of the court, and a part is not, it should be retained and an amendment allowed limiting it to the matter within the jurisdiction.—In re Newfoundland Syndicate, U. S. D. C., 196 Fed. 443.

4.——Lien.—While the filing of a bankruptcy petition is a caveat and in effect an attachment and injunction, the lien dates from the commencement of the proceeding, except as to fraudulent conveyances.—In re Flatland, C. C. A., 196 Fed. 310.

5.——Preference.—That a payment by a bankrupt was on account of money due from him as trustee, but which he had applied to his own use, does not relieve it from being a preference, when made within four months prior to his bankruptcy and when insolvent.—In re Dorr, C. C. A., 196 Fed. 292.

6.——Preference.—The collection of a note by a bank by attachment and sale of the attached property on execution within four months prior to the bankruptcy of the maker held on the evidence not collusive nor to constitute a voidable preference.—Stanley v. Pajaro Valley Bank, C. C. A., 196 Fed. 365.

7.——Release.—The court, on motion to cancel a judgment against one who has been discharged in bankruptcy, may look behind the judgment to determine the character of the liability on which it is founded, and thereby determine whether a discharge releases the judgment, under Bankruptcy Act, § 17.—Maier v. Maier, 135 N. Y. Supp. 1038.

8. **Banks and Banking**—Forgery.—A bank transferring a forged note and mortgage held by it as collateral to secure a note payable to it held required to repay the amount received from the transferee.—Zwickel v. American Savings Bank & Trust Co., Wash., 124 Pac. 386.

9. **Bills and Notes**—Due Course of Business.—"In due course of business" involves indorsement to the holder before maturity, where the instrument is payable to order.—Cochran v. Stein, Minn., 136 N. W. 1037.

10.——Indorsers.—Indorsers of negotiable paper as respects one another are prima facie liable in the order in which they indorse.—Harris v. Jones, N. Dak., 136 N. W. 1080.

11. **Boundaries**—Estoppel.—A grantor and his grantee are bound by the description in the deed, and by the description of the lot as found in the recorded plat of it, and not by temporary stakes set in the ground, as locating or bounding the lot.—Bast v. Mason, Mo., 148 S. W. 398.

12.——Prescription.—Where the line between owners of land is in dispute, and they establish a boundary following it by possession with reference to the boundary so fixed for the full statutory period, that line becomes the boundary line.—Miller v. Farmers' Bank & Trust Co., Ark., 148 S. W. 513.

13.——Surveys.—Surveys are entitled to little weight as evidence of the location of the line as against practical location by fences or by occupation for many years.—Lawler v. Brennan, Wis., 136 N. W. 1058.

14. **Brokers**—Commission.—It is no defense to an action by an agent to recover commission for selling real estate that the principal does not hold title to the land.—Sturgeon v. Culver, Kan., 124 Pac. 419.

15.——Revocation.—As between principal and agent, an agency, given to real estate dealer to sell certain land at a stipulated price, may be revoked at any time.—Anderson v. Shafer, Kan., 124 Pac. 423.

16.——Stock on Margin.—Where a broker is directed to purchase stock for a customer on margin, the stock, subject to the broker's lien, belongs to the customer.—Shiel v. Stoneham, 135 N. Y. Supp. 1024.

17. **Carriers of Goods**—Initial Claim.—Under the Carmack Amendment, an initial carrier which contracted at a single rate to transport eggs from a point in Texas to New York City under a bill of lading providing that the cars should be stopped at intermediate points to receive additional shipments, is liable for damages to the shipment, including eggs loaded at a point on the connecting line.—De Winter & Co. v. Texas Cent. R. Co., 135 N. Y. Supp. 893.

18.——Proximate Cause.—A carrier is liable for breach of its contract to give notice of the arrival of goods to the consignee, to the extent of any damages which naturally and proximately result therefrom.—Greek-American Produce Co. v. Illinois Cent. R. Co., Ala., 58 So. 994.

19. **Carriers of Passengers**—Variance.—There was no fatal variance between an averment that the accident occurred at or near the intersection of Eleventh avenue and Twenty-fourth Street South, and proof that the accident occurred at Fourteenth street.—Birmingham Ry., Light & Power Co. v. Lide, Ala., 58 So. 990.

20. **Chattel Mortgages**—Maturity of Debt.—Where, upon one note becoming due, the mortgagor seized on notice of sale the property covered by the mortgage, this was a sufficient declaration of his intention to declare the whole debt due.—Woodward v. Lutsch, Wash., 124 Pac. 393.

21. **Commerce**—Employes.—An employee of an interstate railroad company expressly ordered to report at a station for duty on an interstate train, who was killed at such station through the negligence of other employees, held to have been employed in interstate commerce within the meaning of Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).—Lamphere v. Oregon R. & Nav. Co., C. C. A., 196 Fed. 336.

22. **Conspiracy**—Accountability.—The criminal accountability of a conspirator in a purpose contemplating the commission of a criminal offense extends, not only to the purpose in which he engages, but to the proximate and natural consequences of such purpose.—Pearce v. State, Ala., 58 So. 996.

23.——Overt Act.—The union in the unlawful purpose does not constitute the crime of conspiracy to defraud the United States, within Rev. St. § 5440, which requires not only the unlawful conspiracy, but that some party must do an act to effect its object.—Hyde v. United States, 32 Sup. Ct. Rep. 793.

24. **Constitutional Law**—Police Power.—While it is for the Legislature to determine when conditions exist calling for the exercise of police power, the Legislature's judgment in enacting laws under such power is not conclusive of their validity.—People v. Elerding, Ill., 98 N. E. 982.

25. **Contracts**—Building Contract.—Where a builder undertakes to furnish labor and material in the building of a house for a specified sum, he cannot recover for partial construction in case the building be destroyed without fault of either party, unless he is protected against such contingency by the terms of the contract.—Keeling v. Schastey & Vollmer, Cal., 124 Pac. 445.

26.——Burden of Proof.—A party attacking a contract on the ground that it has not been signed by all the parties thereto has the burden of showing that when he signed it it was agreed that it should not take effect until signed by all.—Muehlebach v. Missouri & K. I. Ry. Co., Mo., 148 S. W. 453.

27.——Pleadings and Proof.—Where an action is founded upon a void express contract, recovery cannot be had on the theory of an implied contract.—Hubbard v. Hubbard, 135 N. Y. Supp. 908.

28.——Seal.—A sealed contract is presumed to have been made upon a consideration, without recital therein of consideration, though such presumption is rebuttable.—Lessler v. De Loynes, 135 N. Y. Supp. 948.

29.——Wills.—As to contracts, where the language used is presumed to have been chosen because it aptly described the respective rights and liabilities of the parties, greater strictness of construction is properly required than in the construction of wills.—Davis v. New York Life Ins. Co., Mass., 98 N. E. 1043.

30. **Corporations**—Knowledge of Officer.—In a suit to impose a resulting trust on land sold to a corporation by its president, the corporation is not chargeable with the president's knowledge that a part of complainant's money had been used to purchase the land, where the president acted in his own interest.—Lee v. R. H. Elliott & Co., Va., 75 S. E. 146.

31.——Annual Statement.—A statute requiring a corporation to file an annual statement showing its financial condition, and making its officers individually liable for its debts in case of default, is not purely penal.—Great Western Mach. Co. v. Smith, Kan., 124 Pac. 414.

32.——Trust Relation.—Officers of a corporation may purchase the shares of stockholders on the same terms and as freely as they might buy from a stranger.—Bawden v. Taylor, Ill., 98 N. E. 941.

33.——Ultra Vires.—It is impossible to add shares of capital stock of a corporation in excess of the number fixed by the charter.—Leurey v. Bank of Baton Rouge, La., 58 So. 1022.

34.——Ultra Vires.—Where a person contracts with officers of a corporation and the incapacity of the corporation is patent on the face of the contract, the person contracting as well as the officers is chargeable with notice of want of power, and he cannot hold the officers personally liable.—State v. F. B. Williams Cypress Co., La., 58 So. 1033.

35. **Courts**—Appeal and Error.—Whether officers of a state grand lodge of a fraternal order, incorporated under federal General Incorporation Act May 5, 1870, may prosecute in state court applications to be made a domestic corporation, cannot be reviewed by the federal Supreme Court on writ of error to a state court.—Creswill v. Grand Lodge, K. P. of Georgia, 32 Sup. Ct. Rep. 822.

36.——State as Party.—The state is a proper party defendant in a writ of error sued out to review judgment of state court suspending collection of tolls until the roads were properly repaired, though the state was not a party to the proceeding leading up to the judgment.—Norfolk & S. Turnpike Co. v. Commonwealth of Virginia, 32 Sup. Ct. Rep. 828.

37. **Criminal Evidence**—Flight.—It is always permissible to show flight and search for an accused.—Gotcher v. State, Tex., 148 S. W. 574.

38.——Homicide.—On a trial for murder by shooting, evidence of experiments to show how far a pistol would powder-burn cloth similar to clothing worn by decedent is competent.—Hughes v. State, Tenn., 148 S. W. 543.

39.——Voluntary Intoxication.—One committing assault and battery or an assault cannot show in defense that he was intentionally drunk at the time and incapable of forming an intent to injure.—McGee v. State, Ala., 58 So. 1008.

40. **Criminal Law**—Appeal and Error.—Where the attorney of accused attempted in good faith to perfect an appeal, but through ignorance of the rules failed to serve a notice of appeal on the Attorney General and to send to the clerk of the Supreme Court a copy of the notice within the time provided, but there was no great delay in taking the steps required, his failure to comply with the rules will be excused.—State v. Price, S. Dak., 136 N. W. 1087.

41.——Overt Acts.—Conspiracy to use the mails to defraud, within Rev. St. § 5480, which the indictment alleges was designed to be and was in fact continuous, continues, so far as the limitations are concerned, so long as the overt acts are done by any of the conspirators.—Brown v. Elliott, 32 Sup. Ct. Rep. 812.

42. **Damages**—Liquidated.—A contract for a penalty is an agreement to pay a stipulated sum in case of default, intended to coerce performance, to punish default, or to secure the payment of actual damages, while a contract for liquidated damages is a contract by which the parties in advance of breach fix the amount of damages which will result therefrom and agree on its payment.—Muehlebach v. Missouri & K. I. Ry. Co., Mo., 148 S. W. 453.

43.——Liquidated.—Landlord's damages from tenant's breach of agreement are so impossible of exact determination as to support a stipulation for liquidated damages.—Barrett v. Monro, Wash., 124 Pac. 369.

44. **Descent and Distribution**—Vested Interest.—An heir has no vested right to inherit the property of the ancestor, and, where a statute under which a child claims to be the enforced heir of the surviving second wife of the deceased father is repealed before the death of the wife, the child cannot inherit.—Cropper v. Glidewell, Ind., 98 N. E. 1012.

45. **Divorce**—Alimony.—Where a husband suing for divorce had a good income, and his wife was without means, a reasonable allowance should be made to her to defray the expenses and attorney's fees on plaintiff's appeal from a judgment sustaining a motion for alimony and suit money.—Libbe v. Libbe, Mo., 148 S. W. 460.

46.——Custody of Children.—Where the mother abandons the family, the father's common-law right to the custody of children should prevail under the Domestic Relations Law, unless it would be for the welfare of the child that its custody should be given to the mother.—Ullman v. Ullman, 135 N. Y. Supp. 1080.

47. **Dower**—Consummate.—A widow's dower ceases to be contingent and becomes consummate on the death of the husband, but is a mere chose in action until it is assigned.—Underground Electric Rys. Co. of London v. Owsley, C. C. A., 196 Fed. 278.

48. **Eminent Domain**—Right of.—In proceedings by a railroad company to condemn crossing over the line of another company, the fact that such railroad was intended only to serve private industries in which its promoters were financially interested would not deprive it of its right to condemnation proceedings.—St. Louis, I. M. & S. Ry. Co. v. Ft. Smith & V. B. Ry. Co., Ark., 148 S. W. 531.

49. **Estoppel**—Donee of Power.—A donee of a power, making a conveyance in mortgage with covenants of warranty, held estopped from exercising the appointment under the power to the prejudice of the mortgagee.—Langley v. Conlan, Mass., 98 N. E. 1064.

50. **Evidence**—Competency.—Great latitude is to be allowed in the reception of indirect or circumstantial evidence, including all evidence of an indirect nature, and the competency of the collateral fact is not to be determined by the conclusiveness of the inferences it may afford; but, if they tend to elucidate the inquiry, it is enough.—Baugher v. Boley, Fla., 58 So. 980.

51.——Foreign Statute.—Where the law of the state in which a personal injury was received is not pleaded, the law of Missouri will be taken as controlling in an action in this state for the injuries.—Thompson v. St. Louis Southwestern Ry. Co., Mo., 148 S. W. 484.

52.——Handwriting.—Where the genuineness of handwriting is in issue, specimens admitted or proved to be genuine are admissible for comparison.—Cochran v. Stein, Minn., 136 N. W. 1037.

53. **Executors and Administrators**—Instructions.—It was not error to charge, in passing on the sufficiency of a year's support, to keep in view the circumstances of the family prior to the death of the father, and the solvency or insolvency of the estate.—Carter v. Davidson, Ga., 75 S. E. 155.

54. **False Pretenses**—Intent.—One may be guilty of obtaining money by false pretenses, though he has a reasonable expectation of repaying the money so obtained.—Gardner v. State, Ala., 58 So. 1001.

55. **Fraudulent Conveyances**—Presumption.—It will not be presumed from the mere fact of relationship that a conveyance from a parent to a child is the result of fraud or undue influence; but the fraud or undue influence must be proved.—Smith v. Kopitzki, Ill., 98 N. E. 953.

56.——Voluntary.—A voluntary conveyance is presumptively fraudulent as against existing creditors of the donor, and the burden is on the donee to repel such presumptions.—Star v. Penfield, Mo., 148 S. W. 382.

57. **Frauds, Statute of**—Parol Evidence.—Where, in an action on a sale contract consisting of two separate writings, it is sought to take the contract out of the statute of frauds, by imputing one memorandum into the other, evidence of the identity of the memorandum referred to may be supplied by parol, provided the parol evidence clearly identifies it.—Albert C. Field v. Kieser, 135 N. Y. Supp. 1094.

58.——Part Performance.—Performance by plaintiff of agreement to support her father and stepmother during their natural lives held to take their agreement to transfer land to her out of the statute of frauds.—Purcell v. Corder, Okla., 124 Pac. 457.

59.——Part Performance.—There having been a contract of sale by plaintiff to defendant of an article in defendant's possession, subsequent conversion and sale thereof by defendant constituted an acceptance of the article, taking the contract out of the statute of frauds.—Young v. Ingalsbe, 135 N. Y. Supp. 939.

60.——Part Performance.—A parol contract by a buyer of corporate stock to pay a certain amount annually is not taken out of the statute of frauds by performance by the buyer.—Hubbard v. Hubbard, 135 N. Y. Supp. 908.

61. **Gaming**—Borrowed Money.—A debt for money borrowed by a husband for the purpose of gambling in futures, which fact was known to the lender, could not be collected.—Catton v. Catton, Wash., 124 Pac. 387.

62. **Guaranty**—Construction.—A contract of guaranty is not subject to the rule that a promise will be construed against the promisor; and liability will not be enlarged beyond the fair import of its terms.—Third Nat. Bank of Cincinnati v. Laidlaw, Ohio, 98 N. E. 1015.

63. **Homicide**—Defense of Father.—A son killing another in necessary defense of his father held to have the same right of self-defense as the father would have had.—Pearce v. State, Ala., 58 So. 996.

64. **Husband and Wife**—Community Property.—The law presumes that property acquired in the name of the wife during existence of the community was acquired for the community, and a wife claiming it as separate property must rebut that presumption.—Gastauer v. Gastauer, La., 58 So. 1012.

65.——Gift.—Where a husband purchased and paid for lands taking the deeds in the name of his wife, a presumption of gift will be indulged in the absence of credible and preponderating proof to the contrary.—Carpenter v. Gibson, Ark., 148 S. W. 508.

66. **Innkeepers**—Insurers.—An innkeeper is an insurer of the baggage of his guest against loss by fire.—Pettit v. Thomas, Ark., 148 S. W. 501.

67. **Insurance**—Fraternal Insurance.—Neither a subordinate lodge of a fraternal order nor its officers have authority to waive provisions of the society's constitution and by-laws prohibiting the insurance of persons engaged in retailing liquor.—Sovereign Camp Woodmen of the World v. Hall, Ark., 148 S. W. 526.

68.——Fraternal Insurance.—Where there was nothing in the by-laws and rules of a fraternal insurance order, or in the certificate of insurance, to prevent the collector of assessments from paying the assessment of the insured, a payment by her of his assessment reinstated his insurance.—Walker v. United Order of the Golden Star, Mass., 98 N. E. 1039.

69.——Interest in.—An insurance policy, payable to the wife of insured, and in case of her death before the death of insured to her children for their use, children of the wife's deceased daughter took no interest under the policy on the death of the wife before the death of insured.—Davis v. New York Life Ins. Co., Mass., 98 N. E. 1043.

70.——Printed Clauses.—A printed clause in a fire policy, providing that an insurance should be avoided on the keeping of benzine, held properly disregarded, where the insurance covers the stock of a merchant tailor, if it appears that necessarily, or within the expectation of the parties, the stock included a small amount of benzine.—Gropper v. Home Ins. Co., 135 N. Y. Supp. 1028.

71.——Vacancy Permit.—Where a fire policy provided for forfeiture in case the premises became or remained vacant, and the insured, knowing that the premises were vacant, notified the insurer, requesting a vacancy permit, the insurer, having remained quiescent until a loss occurred, cannot set up the condition.—Patterson v. American Ins. Co. of Newark, Mo., 148 S. W. 448.

72. **Judgment**—Amendment.—A court has authority to amend the record of a judgment by a nunc pro tunc order at a subsequent term, by adding findings which the bill of exceptions shows were made.—Brown v. United States, C. C. A., 196 Fed. 351.

73.——Evidence.—The records in a criminal case are as a general rule inadmissible in civil cases as evidence of the facts on which a constreet improvement should be on file for the information of the property owners prior to the viction in the criminal case was had.—Fonville v. Atlanta & C. Air Line Ry. Co., S. C., 75 S. E. 172.

74.——Full Faith and Credit.—Full faith and credit can be given to a judgment allowing a claim against a decedent's estate only by ascertaining its effect in the courts of the state where it was rendered.—Owsley v. Central Trust Co. of New York, U. S. D. C., 196 Fed. 412.

75. **Landlord and Tenant**—Partial Eviction.—An actual partial eviction suspends the rent only during the continuance of the eviction, and upon the termination thereof the rent revives.—Goldberger v. Kaufman, 135 N. Y. Supp. 1040.

76. **Libel and Slander**—Privilege.—The report of a commission appointed to investigate difficulties between a minister and members of his church according to the rules of the church held privileged.—Bass v. Matthews, Wash., 124 Pac. 384.

77. **Licenses**—Franchise.—The right to exist and carry on business as a corporate entity is a "commodity," subject to the power of the Legislature to lay an excise, under Const. pt. 2, c. 1, § 1, art. 4.—Farr Alpaca Co. v. Commonwealth, Mass., 98 N. E. 1078.

78. **Marriage**—Proof of.—Marriage may be proved by the oral testimony of those present; and it is not required that the record of the issuance of the license and of the marriage be produced.—Boling v. State, Neb., 136 N. W. 1078.

79. **Master and Servant**—Assumption of Risk.—Where the master is guilty of a violation of a statutory duty, the doctrine of assumption of risk has no application.—Koehler v. Harmon, Ind., 98 N. E. 1009.

80.——Dangerous Machinery.—Where it is practicable for a master to guard dangerous machinery, and there is a failure to guard and a resulting accident, the master is negligent as a matter of law.—Falconer v. Sherwood, Minn., 136 N. W. 1039.

81.——Derailment.—Where an engine is derailed while run by a conductor not shown to have run an engine before nor to be licensed to run an engine, there can be no recovery against the employer of damages for the consequence to the conductor.—Gibson v. New Orleans Terminal Co., La., 58 So. 1015.

82.——Federal Employes.—Act March 22, 1911 (St. 1911, p. 437), limiting the time females may be employed, that is engaged in the service of another, in certain establishments, including hotels, to eight hours a day, is not so manifestly unreasonable and unnecessary for the promotion and preservation of public health and welfare that it can be declared not to be a proper police regulation.—Ex parte Miller, Cal., 124 Pac. 427.

83.——Police Power.—Sex alone will not in all cases serve as a proper basis for the exercise of the police power in the regulation of the hours of labor.—People v. Elerding, Ill., 98 N. E. 982.

84.——Rules for Protection.—Where a manufacturing company employed servants to work about immense tables, which were being shifted from one position to another, it owed its servants a duty to provide rules for the protection of the servants.—Peppers v. St. Louis Plate Glass Co., Mo., 148 S. W. 401.

85. **Mayhem**—Statutory Construction.—The word "instrument," in the statute punishing the disfiguring of the person of another by means of a knife or other instrument, includes carbolic acid.—Lee v. State, Tex., 148 S. W. 567.

86. **Mortgages**—Executors and Administrators.—A mortgage expressly authorizing the mortgagee or his assigns to purchase at the foreclosure sale warrants his executor in bidding for the purchaser.—Stone v. Haskell, Mass., 98 N. E. 1032.

87.——Release.—Where a mortgage is not due, the mortgagee cannot be compelled to accept payment and release it.—Smiddy v. Grafton, Cal., 124 Pac. 433.

88. **Municipal Corporations**—Liability.—If a business is lawfully conducted by a town partly and incidentally for profit, it is liable at common law for negligence in managing such business.—O'Connell v. Inhabitants of North Attleborough, Mass., 98 N. E. 1084.

89.——Street Improvement.—It is not necessary that the plans and specifications for a

time of advertising for bids.—Miller v. City of Oelwein, Ia., 136 N. W. 1045.

90. **Negligence**—Aggravation of Injury.—Where personal injuries result in part from negligence of defendant and in part from his voluntary intoxication, but the intoxication is not a contributory cause of his injury, the jury should award plaintiff the damages fairly chargeable to defendant's negligence, but not any added injuries or losses resulting from intoxication.—O'Keefe v. Kansas City Western Ry. Co., Kan., 124 Pac. 416.

91.——Licensees.—Where it is shown that children were in the habit of going into railroad cars in switchyards without objection from employees, it is sufficient to support an inference of license which requires the company to use reasonable care for their protection.—Northern Pac. Ry. Co. v. Curtz, C. C. A., 196 Fed. 367.

92. **Party Walls**—Possession.—One owning a building inclosed on one side by a party wall does not by his possession of the building have possession of the entire party wall.—Miller v. Farmers' Bank & Trust Co., Ark., 148 S. W. 513.

93. **Principal and Agent**—Notice.—Where a contract for the sale of a threshing machine provided for notice of defects to be given by registered mail to the seller direct, notice to the local selling agent was not notice to the seller.—Gaar, Scott & Co. v. Nelson, Mo., 148 S. W. 417.

94.——Ratification.—Ratification of an instrument under seal, executed by an agent without authority under seal, to be binding on the principal, must also be under seal.—Neely & Co. v. Stevens, Ga., 75 S. E. 159.

95.——Sealed Instrument.—Where an agent, without authority to execute a sealed instrument, signs a contract of lease under seal for his principal, the latter is not bound.—Lynch v. Poole, Ga., 75 S. E. 158.

96. **Prostitution**—Common Law.—Deriving support and maintenance in part from the earnings and proceeds of a known prostitute was not an offense at common law.—Commonwealth v. Peretz, Mass., 98 N. E. 1054.

97. **Quieting Title**—Parties.—A vendor who had conveyed by warranty deed held not entitled to maintain suit to quiet title, where his liability on the covenant of warranty had been terminated by a quitclaim conveyance by the vendee.—Hounchin v. Salyards, Iowa, 136 N. W. 1049.

98. **Railroads**—Negligence Per Se.—The constant violation of a statute providing for the stopping of street cars at railway crossings is held not to relieve a motorman from his negligence per se in running his car over tracks in violation of the statute in an action for his injuries from being struck by a train.—Clark v. St. Joseph Terminal R. Co., Mo., 148 S. W. 472.

99.——Notice.—Railroad companies must take notice of conditions created by the use of their platforms and stations by the public with their expressed or implied encouragement, and use reasonable care to avoid injury to those so using their premises.—Thompson v. St. Louis Southwestern Ry. Co., Mo., 148 S. W. 484.

100.——Trespasser.—In an action for the death of a trespasser who was killed by the willful and wanton negligence of the employees of a railroad company, his contributory negligence is not in issue.—Neice v. Chicago & A. R. Co., Ill., 98 N. E. 989.

101. **Rape**—Corroboration.—In a prosecution for statutory rape, where the female testifies positively to the facts, and defendant positively denies her, her testimony must be corroborated.—Boling v. State, Neb., 136 N. W. 1078.

102. **Receipts**—Parol Evidence.—The rule that parol evidence is inadmissible to contradict a written contract does not apply with respect to receipts.—McDaniel v. United Rys. Co. of St. Louis, Mo., 148 S. W. 402.

103. **Removal of Causes**—Parties.—A suit brought in a court of one state by a corporation of another state against an alien corporation is removable under Act March 3, 1887, corrected by Act Aug. 13, 1888.—Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., C. C. A., 196 Fed. 340.

104. **Sales**—Conditional Sale.—A conditional sale contract is subject to the general rules governing other contracts, and an offer to sell or buy and acceptance of the offer is necessary.—In re Osborn, C. C. A., 196 Fed. 257.

105.——Measure of Damages.—In an action for breach of warranty of machines sold, it was improper to award damages arising from loss of profits on articles which might have been manufactured by the machines, where plaintiff had no orders or contracts for the sale of such articles, though he had done an extensive business in the same class of goods which he had previously manufactured by hand.—Schug v. Wagner, 135 N. Y. Supp. 1078.

106.——Rescission.—Where a sale of lumber was made partially on credit, and there was no fraud or misrepresentation in obtaining the credit, the failure to pay the deferred installment according to promise affords the seller no ground to rescind the contract and retake the lumber.—Colvin v. Southern Lumber Co., Ark., 148 S. W. 496.

107.——Waiver.—If, after contracting to buy stone from plaintiff, defendants notified him that they would not receive or purchase it, and this was done within time in which he had to deliver, he was excused from delivering as a condition precedent to recovery.—Terrell v. Nelson, Ala., 58 So. 989.

108. **Specific Performance**—Adequate Consideration.—To compel the specific performance of a contract to convey real estate, it must affirmatively appear by the complaint that the consideration for the conveyance is fair and adequate.—Walter G. Reese Co. v. House, Cal., 124 Pac. 442.

109.——Time of Essence.—Time will not be considered as of the essence of a contract, in equity, unless it affirmatively appears that the parties regarded it as an essential element of their bargain.—Mercantile Nat. Bank of City of New York v. Heinze, 135 N. Y. Supp. 962.

110. **Time**—Computation.—In computing time under statutes of limitation, the first day should be excluded, and the last included.—Peay v. Pulaski County, Ark., 148 S. W. 491.

111. **Trusts**—Dissolution.—Where property is given for the benefit of certain persons in such a way that no one else can have a possible interest in it, such persons are in effect absolute owners, and equity will decree a dissolution of the trust.—Langley v. Conlan, Mass., 98 N. E. 1064.

112.——Parol Evidence.—Where a husband procured land to be conveyed to his wife, he could not establish a trust in favor of his children by parol evidence.—Carpenter v. Gibson, Ark., 148 S. W. 508.

113.——Statute of Uses.—The statute of uses does not apply to personal property.—Smith v. Smith, Ill., 98 N. E. 950.

114. **Waters and Water Courses**—Common Law.—The common-law rule that the mere diversion and casting out of surface water is no cause of action, unless it is recklessly done, prevails in Missouri.—Thoele v. Marvin Planing Mill Co., Mo., 148 S. W. 413.

115. **Wills**—Intestacy.—Where the language of a will is so uncertain that it cannot be determined therefrom what disposition the testator intended as to certain property described, testator will be held to have died intestate as to such property.—Karsten v. Karsten, Ill., 98 N. E. 947.

116.——Process.—In an action for the judicial construction of trusts in a will relating to real and personal property, a nonresident defendant, who is a son of the testator and a beneficiary in the trust, is properly served by publication.—Knox v. Knox, Kan., 124 Pac. 409.

117.——Revocation.—Where an olographic will written in lead pencil was torn up by the universal legatee as invalid, and the testator then pasted the pieces in order and retained it for several years, and delivered it to the universal legatee for safe-keeping, it did not show intent to revoke the will.—Succession of Swanson, La., 58 So. 1030.

118.——Specific Performance.—A party may obligate himself to make a will in a particular way, or to give specific property at his death; but courts will require satisfactory proof of such contracts, and the fairness of the transaction.—Haubrich v. Haubrich, Minn., 136 N. W. 1025.